Supreme Court, U.S.
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No. 98-2027

IN THE

Supreme Court of the United States

BARTHOLOMEW J. LAWSON
and NANCY A. LESTER,

Petitioners,

v.

ROBERT ABRAMS, individually and as
New York State Attorney General, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

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Petitioners herein reply to the Union Respondents' Brief in Opposition to Petition for Certiorari. The State Respondents and Respondent Nachamkin elected not to reply to our petition.[1]

I. MAYER BENDET'S CONTRADICTORY TESTIMONY BEFORE GRAND JURY

The Union Respondents quoted passages of Mayer Bendet's undated testimony before the grand jury that Petitioner Lawson paid him $5000 on May 7, 1980, to blow up a Union trailer as a means of getting "rid of the Union." (Union Reply 5-7). The recitation, however, failed to disclose the qualifying testimony which Bendet gave to the same grand jury on January 28, 1982, which, in part, concerned an affidavit signed by Bendet and read by State Respondent Calvacca to the grand jury. In it Bendet stated: "Bart Lawson never hired me to bomb a trailer in return for payment of $5000. . . . Bart Lawson nor myself never took any such joking seriously." (C.A. Jt. App. A- 823). After the affidavit was read, Bendet testified as follows:

> Q. Was he joking that night, was he laughing, hysterical, was he kidding, . . . when he said this?
>
> A. No. he's too smart for that. . . . Understand one thing; Lawson will tell twenty people in

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1. We will refer to the appendix annexed to the Petition as "App." and to the Joint Appendix filed with the court of appeals as "C.A. Jt. App." each followed by the applicable page number(s). Our Petition for Certiorari will be referred to as "Petition" and the Union Respondents' Brief in Opposition to Petition for Writ of Certiorari as "Union Reply," each followed by the applicable page number(s).

> the room when it's night outside that it's day right now, and expect everybody to believe him. And he would tell me, "Go blow up the trailer" to impress somebody else. And I walk out of the room actually believing that he wasn't serious.
>
> * * *
>
> Q. In other words, to impress people; is that your testimony?
>
> A. That's Bart Lawson. Now the question was: Was he serious or not serious. In my opinion, he was not. (C.A. Jt. App. A-839).

II. REASONS FOR GRANTING PETITION FOR CERTIORARI

A. Conflict among the Circuit Courts of Appeals on Meaning of De Novo Review

The Union Respondents argue that:

> The issues raised were settled by this Court long ago in *United States v. Raddatz*, . . . [T]here is no conflict among the circuits concerning the meaning of "de novo" review. . . .[2]

(Union Reply 13-14).

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2. The Union Respondents, in error, cited the applicable "de novo" statute as the nonexistent 28 U.S.C. § 636(b)(1)(e); the correct citation is 28 U.S.C. § 636(b)(1)(C).

The Union Respondents do not explain why they reject the view of Judge Easterbrook of the Seventh Circuit in *United States v. Rodriguez*, 888 F.2d 519, 521-22 (7th Cir. 1989) who noted a dispute between his Seventh Circuit and the Fifth and Eleventh Circuits. (Petition 9). In our petition we set forth cases showing that the dispute is even broader than described in *Rodriguez*. (Petition 10-14).

In our petition we cited three decisions which took an extremely deferential position on de novo review, i.e. *Andrews v. Deland*, 943 F.2d 1162, 1168-71 (10th Cir. 1991); *Clark v. Poulton*, 963 F.2d 1361, 1368 (10th Cir. 1992); and the circuit court decision in the instant case. (Petition 10-13; App. 1a-6a at 4a). The latter two cases are similar to the holding in *Andrews* which stated "We will not look behind a district court's express statement that it engaged in a de novo review of the record." *Andrews v. Deland*, 943 F.2d at 1171. These three cases seem to imply that the use of statutory words is conclusive proof of a de novo review. On the other hand, many other circuit courts have rejected a purported "de novo" review by a district court when certain objective circumstances are present. In our petition we cited numerous cases in the Fourth, Fifth, Sixth, Eighth and Tenth Circuits which have ruled that a failure of the district court to obtain and review a transcript or recording of testimony before the magistrate is an objective reason for finding that a de novo review was not afforded to the objecting party.[3] (Petition 13). Indeed, a decision in the Tenth Circuit prior to *Andrews* and *Clark* reached that conclusion. *Gee v. Estes*, 829 F.2d 1005, 1008-09 (10th Cir. 1987). A number of other circuit courts look to other objective standards which a district court

3. We noted in our petition that testimony before a magistrate is not generally available in a summary judgment case, which pertains in the instant case. (Petition 13, n.6).

must address in order to perform a de novo review. In our petition we cited cases in the Fourth, Sixth and Eleventh Circuits identifying such additional objective factors. (Petition 14).

Petitioners disagree that *Orpiana v. Johnson*, 687 F.2d 44 (4th Cir. 1982) supports the Union Respondents' position. (Union Reply 17; Petition 13, 14). While it is true that there was an absence of a transcript in that case, the holding also turned on the court's failure to rule "on those objections required [in] a de novo determination by the district court." 687 F.2d at 48. Cases such as *Hosna v. Groose*, 80 F.3d 298 (8th Cir. 1996) are not applicable because Petitioners have supplied affirmative evidence of errors made by the magistrate judge. (C.A. Jt. App. A-1293-1356; Petition 19-21). The Union Respondents failed to address *United States v. Shami*, 754 F.2d 670 (6th Cir. 1985) (per curiam) which held there was no de novo review because, *inter alia*, "the district court failed to review all of the defendant's objections." 751 F.2d at 672. (Petition 14).

The Union Respondents cited a decision in the Ninth Circuit to support its argument. It, however, stated a test in this regard in conflict with *Andrews* and *Clark*. *United States v. Remsing*, 874 F.2d 614, 616 (9th Cir. 1989). The court stated:

> The district court is in an 'appellate' role when reviewing the magistrate's findings and recommendations; its function is to correct those findings made by the magistrate when the litigant has identified a possible error.

This language is clearly in conflict with the Second Circuit's decision in the instant case. (Petition 12). Nothing was said about Judge Amon's failure to address and "correct those findings made by the magistrate when the litigant has identified a possible error." *Remsing*, 874 F.2d at 616.

B. Conflicts among the Circuit Courts of Appeals on the Standard of Review of a District Court's Review of a Magistrate Judge's Report

The Union Respondents argue that there is no conflict among the courts of appeals "concerning the standard applied to reviewing a district court's review of a magistrate judge's report." (Union Reply 18). Petitioners disagree and again the Union Respondents reject the view in *Rodriguez*, 888 F.2d at 521-22. (Petition 15-19). The Union Respondents support their position by citing *Stanley v. Hejirika*, 134 F.3d 629 (4th Cir. 1998); *Cumbie v. Singletary*, 991 F.2d 715, 719, *cert. denied*, 510 U.S. 1031, 114 S. Ct. 650, 126 L. Ed. 2d 608 (1993); *Grimsley v. MacKay*, 93 F.3d 676, 679 (10th Cir. 1996) and *Tamez v. City of San Marcos, Texas*, 118 F.3d 1085, 1091 (5th Cir. 1997). Neither *Stanley v. Hejirika* nor *Grimsley v. MacKay* are directly relevant because each involved a consensual submission by the parties of the case to a magistrate judge under 28 U.S.C. § 636(c)(1) not § 636(b)(1)(B). In *Cumbie v. Singletary*, the court cited *Lo Conte v. Dugger*, 847 F.2d 745 (11th Cir. 1988) as the basis for its expansive standard of review and we cited *Lo Conte* as representative of the decisions in the Third, Fifth, Sixth and Eleventh Circuit Courts of Appeals which are in conflict with those of the Second, Seventh, Eighth and Eleventh Circuit Courts of Appeals which favor a limited review. (Petition 15-19). *Tamez v. City of San Marcos, Texas* is another good example of an expansive review by a circuit court of mixed questions of law and fact. 118 F.3d at 1094, 1096.

III. THE EVENTS OF JULY 21, 1981

A. The Search of Petitioners' Premises

In our petition we argued that the Court of Appeals for the Second Circuit incorrectly claimed that we failed to plead an unreasonable search in respect to Fogel's removal of a cost report from Petitioners' business establishment on July 21, 1981. (App. 5a). We pointed out that the court of appeals overlooked the language in paragraph 78 of the complaint. (Petition 21). The Union Respondents accepted that there is language regarding this incident in the complaint but that the First Claim for Relief failed to expressly charge an unreasonable search. We argue that the language in the First Claim for Relief, in paragraph 128, is broadly enough stated, i.e. "rights to freedom from false imprisonment; arrest, and malicious prosecution" to encompass an illegal search and seizure which helped produce those results. The Rules of Federal Procedure state, "All pleadings shall be so construed as to do substantial justice." Fed. R. Civ. P. 8(f). In any event, however, the Union Respondents (and possibly the court of appeals) overlooked the Second Claim for Relief for Malicious Prosecution which states in paragraph 135, "The indictment against plaintiff Lawson was produced by fraud, perjury, the suppression of evidence, or other bad faith misconduct." (C.A. Jt. App. A-80). Petitioners argue that the events described in paragraph 78 would qualify as "bad faith misconduct."

B. Fogel's Deposition

The Union Respondents now appear to concede that Magistrate Mann failed to notice in the Record page 118 of Fogel's deposition where he contradicted his statement on

page 110. (Union Reply 20; Petition 20-21). The Union Respondents argue that Judge Amon's failure to respond to our Objections makes no difference because the purloined document had been filed with the Department of Health one week earlier. (Union Reply 20 n.7). They also cited Judge Bernstein, of the State Supreme Court, who stated that these papers "would have been available to the Special Prosecutor in any event." (Union Reply 20; C.A. Jt. App. A-400). The Union Respondents, however, did not include the prior ruling of Judge Aronin, of the State Supreme Court, which states, "It is well established that the exclusionary rule does not apply to grand jury proceedings. . . ." (C.A. Jt. App. A-365-66). In addition, Judge Bernstein failed to specify the statute or regulation under New York law which says that a document in the Department of Health would be available to the Office of Special Prosecutor absent lawful process or that Respondents Savage, Scaringe and Calvacca had any knowledge of the earlier filing. (C.A. Jt. App. A-400).

We informed Judge Amon of the magistrate judge's error on this point, but she failed to address it in the Memorandum and Order. (C.A. Jt. App. A1365-66; App.7a-12a). The fact that the magistrate judge could have made an argument similar to Judge Bernstein's, but did not, is irrelevant. Judge Amon failed to address the error to which we filed an objection. (App. 10a, n.1)

IV. THE UNION RESPONDENTS MISREPRESENT THE HOLDING IN *ROUNSEVILLE v. ZAHL*

A. The Effect of *Rounseville v. Zahl* on Indictment Cases

The Union Respondents try to distinguish the holding in *Rounseville v. Zahl*, 13 F.3d 625 (2d Cir. 1994), which is that disputed issues of fact concerning probable cause are jury questions, based on the fact that in *Rounseville* the criminal action was commenced by an "accusatory instrument" and not by an indictment as in the instant case. (Union Reply 21). They offered no case citation, however, to support this distinction. This is not the law in the Second Circuit; the Court of Appeals in *Marshall v. Sullivan*, 105 F.3d 47 (2d Cir. 1996), in a malicious prosecution case stemming from an indictment, reached the same conclusion on the point as in *Rounseville*. In *Marshall*, the court, in considering the issue of probable cause where there is a factual dispute, stated, "These remain disputed issues of fact which must be tried to a jury." 105 F.3d at 53.[4]

B. Probable Cause

The Union Respondents argue that "the conflicting testimony in . . . [*Rounseville v. Zahl*] went not to probable cause, but to whether the underlying criminal prosecution had terminated in plaintiffs' favor. . . ." (Union Reply 21). The Union Respondents misstated the holding in *Rounseville*.

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4. Even when there is an indictment, the presumption of probable cause "may be rebutted by proof that the defendant misrepresented, withheld or falsified evidence." *White v. Frank*, 855 F.2d 956, 961-62 (2d Cir. 1988); *Colon v City of New York*, 60 N.Y.2d 78, 82-83, 455 N.E.2d 1248, 1250, 468 N.Y.S.2d 453, 455-56 (1983).

In *Rounseville*, the court addressed the four elements of malicious prosecution under New York law. These are:

> (1) the initiation or continuation of a criminal proceeding against plaintiff, (2) termination of the proceeding in plaintiff's favor, (3) the lack of probable cause for commencing the proceeding, and (4) actual malice as the motivation for defendant's action.

13 F.3d at 628.

The court ruled that the second, third and fourth elements required a jury consideration. (13 F.3d 628-29; Petition 24).

V. SUMMARY JUDGMENT AND CONSPIRACY CASES

The Union Respondents argue that the instant case is not in conflict with this Court's decision in *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 90 S. Ct. 1598, 1608 26 L. Ed. 2d 142 (1970). (Union Reply 20-21). We disagree. (Petition 22-23).

VI. CONCLUSION

We again request that the petition for a writ of certiorari be granted.

Dated: August 2, 1999

Respectfully submitted,

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